Jalang ak Paran & Anor v Government of the State of Sarawak & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–133 OF 2006
LOW HOP BING, SYED AHMAD HELMY AND MOHAMAD APANDI JJCA
10 DECEMBER 2010

Civil Procedure — Mode of commencement — Whether Ministerial direction was in realm of public law — Whether trial judge erred in holding that plaintiffs should have proceeded under O 53 of the Rules of the High Court 1980 to challenge direction

Native Law and Custom — Land dispute — Customary rights over land — Extinguishment of native customary rights — Challenge to Ministerial direction — Whether s 5(3) of the Sarawak Land Code upon which direction issued was invalid and unconstitutional — Whether trial judge erred in failing to consider impact of direction on 'life support system' of plaintiffs — Whether trial judge erred in holding that plaintiffs should have proceeded under O 53 of the Rules of the High Court 1980 to challenge direction

The plaintiffs, who were at material times natives of Sarawak, contended that the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 made by the Minister of Resource Planning in Sarawak Government *Gazette* Notification No 388B on 13 February 1997 ('the Ministerial direction') was unlawful and null and void. The plaintiffs challenged the Ministerial direction on the grounds that s 5(3) of the Sarawak Land Code ('SLC'), which expressly provided for the extinguishment of native customary rights ('NCR'), upon which the Ministerial direction was issued was invalid and unconstitutional as it infringed arts 5(1), 8, 13(2) and 153 of the Federal Constitution ('FC') or art 39 of the Sarawak State Constitution. The trial judge found in favour of the defendants and held that the Ministerial direction was valid and not unconstitutional and that the challenge to the Ministerial direction should be by way of judicial review under O 53 of the Rules of the High Court 1980 ('RHC'). This was the plaintiffs' appeal against that decision. In their grounds of appeal the plaintiffs submitted that the trial judge had erred in failing to consider the impact of the extinguishment of their NCR under s 5(3) of the SLC on their 'life support system', and that the trial judge had further erred in holding that the plaintiffs should have proceeded under O 53 of the RHC in seeking to challenge the Ministerial direction. The plaintiffs submitted that their NCR went beyond a

right to property and were in fact a right to life which encompassed the right to livelihood and all the facets that were an integral part of life itself. As such the plaintiffs contended that NCR were fundamental rights protected by art 5 of the FC.

Held, dismissing the appeal with costs:

(1) NCR can be extinguished in accordance with the law and with the payment of compensation and there is no law, either constitutional or statutory, which decrees that it could not be terminated or extinguished at all. Section 5 of the SLC is one such provision in that it is a piece of legislation which provided for the extinguishment of NCR and compensation to be paid for such extinguishment. Hence it is intra vires the FC. In the present case, there was evidence shown that compensation was awarded and paid to the persons whose NCR were extinguished by the Ministerial direction. Hence the trial judge was correct in his ruling that s 5(3) and (4) of the SLC did not violate arts 5, 8, 13 and 153 of the FC (see paras 24 & 26–27).

(2) In the present case, the law did not impose on the Minister a duty to grant the plaintiffs a pre-acquisition hearing. Thus the operation of the audi alteram partem rule was excluded and the plaintiffs' challenge that the Ministerial direction lacked procedural fairness could not be sustained (see paras 32–33).

(3) It is settled law that matters which had substantial a public law element should be proceeded upon through the mechanism as provided for by O 53 of the RHC for otherwise it would be rendered redundant. The Ministerial direction in the instant case was very much in the realm of public law and any challenge should be pursued through the procedure as laid down by O 53 of the RHC (see paras 37 & 40).

[Bahasa Malaysia summary

Plaintif-plaintif, yang mana pada masa matan merupakan anak negeri Sarawak, mendakwa bahawa Arahan Tanah (Penghapusan Hak-Hak Adat Bumiputra) (Kawasan Kilang Kayu Pulpa di Ulu Batang Tatau (No 3) 1997 yang dibuat oleh Menteri Perancangan dan Pengurusan Sumber di dalam Warta Pemberitahuan No 388B pada 13 Februari 1997 ('arahan Kementerian') adalah menyalahi undang-undang, batal dan tidak sah. Plaintif-plaintif mencabar arahan Kementerian tersebut atas dasar bahawa s 5(3) Kanun Tanah Sarawak ('KTS'), yang mana dengan nyata memberi peruntukan untuk pelupusan hak-hak adat anak negeri ('HAAN'), yang mana arahan Kementerian tersebut telah dikeluarkan adalah tidak sah dan tidak berperlembagaan memandangkan ia telah melanggar perkara-perkara 5(1), 8, 13(2) dan 153 Perlembagaan Persekutuan ('PP') atau perkara 39 Perlembagaan Negeri Sarawak. Hakim bicara membuat keputusan menyebelahi

defendan-defendan dan memutuskan bahawa arahan Kementerian tersebut adalah sah dan mengikut perlembagaan dan bahawa cabaran terhadap arahan Kementerian seharusnya melalui semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ini adalah rayuan plaintif-plaintif terhadap keputusan tersebut. Di dalam alasan-alasan rayuan, plaintif-plaintif berhujah bahawa hakim bicara telah khilaf kerana gagal untuk mempertimbangkan impak pelupusan HAAN mereka di bawah s 5(3) KTS pada 'life support system' mereka, dan bahawa hakim bicara selanjutnya telah khilaf dalam memutuskan bahawa plaintif-plaintif seharusnya meneruskan di bawah A 53 KMT dalam memohon untuk mencabar arahan Kementerian tersebut. Plaintif-plaintif berhujah bahawa HAAN mereka melangkaui hak terhadap harta, malahan ianya adalah hak terhadap kebebasan hidup yang mana merangkumi hak pencarian hidup dan kesemua aspek yang merupakan bahagian penting bagi kehidupan. Oleh itu, plaintif-plaintif mendakwa bahawa HAAN merupakan hak-hak penting yang dilindungi oleh perkara 5 PP.

Diputuskan, menolak rayuan dengan kos:

(1) HAAN boleh dilupuskan mengikut undang-undang dan dengan bayaran ganti rugi dan tiada undang-undang, sama ada berperlembagaan atau statutori, yang mendekri bahawa ia langsung tidak boleh ditamatkan atau dilupuskan. Seksyen 5 KTS adalah satu daripada peruntukan tersebut di mana ia merupakan perundangan yang memperuntukkan bagi pelupusan HAAN dan ganti rugi untuk dibayar bagi pelupusan tersebut. Oleh itu, ia adalah intra vires PP. Dalam kes ini, terdapat keterangan menunjukkan bahawa ganti rugi telah diawardkan dan dibayar kepada sesiapa di mana HAAN mereka telah dilupuskan oleh arahan Kementerian. Justeru, hakim bicara adalah betul dalam dapatannya bahawa s 5(3) dan (4) KTS tidak melanggar perkara-perkara 5, 8, 13 dan 153 PP (lihat perenggan 24 & 26–27).

(2) Dalam kes ini, undang-undang tidak mempertanggungjawabkan Menteri dengan kewajipan untuk memberi plantif-plaintif pendengaran pra-pengambilan. Oleh itu, penggunaan peraturan audi alteram partem adalah dikecualikan dan cabaran plaintif-plaintif bahawa arahan Kementerian tidak mempunyai keadilan prosedur tidak boleh diterima (lihat perenggan 32–33).

(3) Adalah menjadi undang-undang tetap bahawa perkara-perkara yang mempunyai elemen undang-undang awam substansial seharusnya diteruskan melalui mekanisma yang telah diperuntukkan oleh A 53 KMT, jika tidak, ia akan dianggap tidak diperlukan. Arahan Kementerian dalam kes ini adalah banyak menjurus kepada skop

undang-undang awam dan sebarang cabaran seharusnya diteruskan melalui prosedur yang diperuntukkan oleh A 53 KMT (lihat perenggan 37 & 40).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 655–664.

For cases on mode of commencement generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5318–5367.

Cases referred to

Adong bin Kawau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158; [1998] 2 CLJ 665, CA (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)

Ketua Pengarah Buruh v Britania Brands (Malaysia) Sdn Bhd [2010] 6 CLJ 370, CA (refd)

PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)

S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)

Sagong bin Tasi & Ors v Kerajaan Negeri Selangor and Ors [2002] 2 MLJ 591; [2002] 2 CLJ 543, HC (refd)

Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor [2005] 2 MLJ 555; [2004] 4 CLJ 775, HC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Legislation referred to

Federal Constitution arts 5, 5(1), 8, 8(1), 13, 13(1), (2), 153
Rules of the High Court 1980 O 53
Sarawak Land Code (Cap 81) s 5, 5(3), (4)
Constitution of the State of Sarawak art 39

Appeal from: Civil Suit No 22–99 of 1999–III(I) (High Court, Kuching)

Baru Bian (Baru Bian Advocates & Solicitors) for the appellants.
JC Fong (State Attorney General of Sarawak, Attorney General's Chambers) for the respondents.

Syed Ahmad Helmy JCA:

[1] The plaintiffs' claim against the defendants herein is for declaratory relief that the extinguishment of the plaintiffs' native customary rights pursuant to the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 made by the Minister of Resource Planning in Sarawak Government *Gazette* Notification No 388B, on 13 February 1997, is unlawful and null and void.

[2] The challenge by the plaintiffs is grounded on their contention that the enabling sections of the Sarawak Land Code upon which the direction was issued is invalid and unconstitutional as it infringes arts 5(1), 8, 13(2) and 153 of the Federal Constitution or art 39 of the Sarawak State Constitution.

[3] By agreement of both parties the trial of the suit proceeded on the basis of agreed issues, facts, bundle of documents, non-calling of witnesses and based on written and oral submissions.

[4] At the conclusion of the trial the learned trial judge found in favour of the defendants and held that the Ministerial direction is valid and not unconstitutional and that the challenge to the Ministerial direction should be by way of judicial review under O 53 of the Rules of the High Court. The learned trial judge based on the facts and documents agreed upon decided in favour of the defendants on all the four issues agreed upon, namely:

(1) Whether or not the reference by the 16 plaintiffs in item 6.4 of the agreed facts and issues to arbitration is deemed to be an acceptance of the extinguishment of their native customary rights to their respective lots under the s 5(3) and (4) of the Land Code?

(2) Whether s 5(3) of the Land Code requires the Director of Lands and Surveys to expressly stipulate the purpose for the extinguishment of the native customary rights over the state land in question, and if so, whether the reference to 'Pulpwood Mill Site' is sufficient to satisfy this requirement?

(3) Whether, having regard to the circumstances and the objectives of establishing the Pulpwood Mill, through a joint venture company, where STIDC is a joint venture partner, the purpose is a 'public purpose' in s 46(a) and (g) of the Land Code?

(4) Whether the provisions in the Land Code as provided in s 5(3) and (4) and any direction made thereunder violate the provisions of the Federal Constitution under arts 5, 8, 13(2) and 153 or art 39 of the Sarawak State Constitution?

[5] The learned trial judge having ruled in favour of the defendants accordingly dismissed the plaintiffs' claim with costs. Though there are 11 grounds advanced by the plaintiffs in their memorandum of appeal nevertheless it can be broadly divided into two categories namely the substantive and procedural challenge.

(a) The substantive challenge is that the learned trial judge erred in failing to consider the 'impact' of the extinguishment of native customary rights under s 5(3) of the Land Code of Sarawak on the 'life support system' of the plaintiffs and their cultural and spiritual values (see grounds 1, 2, 3, 4, 5, 6 and 7 and/or that the extinguishment violates art 5 of the Federal Constitution).

(b) The procedural challenge is that the learned trial judge erred in holding that plaintiffs should have proceeded under O 53 of the RHC 1980, in seeking to challenge the direction made by the Minister.

[6] On the substantive challenge since the subject matter relates to native customary rights it is only appropriate to lay out the essential characteristics of native customary rights. In *Adong bin Kawau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 a native land rights at p 430 was described by the High Court as follows:

> the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. In Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

[7] The view aforesaid was upheld by the Court of Appeal as reported in *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158; [1998] 2 CLJ 665.

[8] Hence the essential characteristic of native customary land is that the native not only have a right over the land but also an interest in the land. It is a right acquired in law and not based on any document of title. It does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration and is a right enforceable by the courts — see the High Court decision in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor and Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543 and upheld by the Court of Appeal in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169.

[9] Another essential characteristic of native customary rights is that although the natives may not hold any title to the land and may be termed licencees, such licence cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation — see Court of Appeal decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555.

[10] By reason thereof learned counsel for the plaintiffs submits that native customary rights, especially in Sarawak are not just property rights but they are to the natives their life support system, a link to their culture and their spiritual values and have existed since time immemorial; they are a right to life itself.

[11] It is learned counsel's further contention that the meaning of 'life' in art 5 of the Federal Constitution should be interpreted broadly as decided by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 in that the expression 'life' art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. The rational of the learned plaintiff's counsel's submission is that if natives are stripped of their NCR, their human existence will be threatened. When they lose their land, their source of food, medicine and life support system which includes their economic, cultural and social way of life will be taken away. If these things are taken away from any human being, they would eventually, either as individuals or as a community, cease to exist. This is more so for indigenous people such as the plaintiffs whose very survival is intrinsically linked to their lands.

[12] In summary the plaintiffs' stand is that native customary rights are fundamental rights which are protected by art 5 of the Federal Constitution. It is a right that goes beyond a right to property and in fact is a right to life which encompasses the right to livelihood and all the facets that are integral part of life itself.

[13] In the context of the Sarawak native customary rights s 5(3) of the Sarawak Land Code expressly provides for the extinguishment of native customary rights.

[14] The relevant provision of s 5(3) reads as follows:

5(3)

(a) Any native customary rights may be extinguished by direction issued by the Minister which shall be

(i) published in the Gazette and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Officer for the area where the land, over which such rights are to be extinguished is situate; and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:

Provided that *where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights* in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

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(a) *Any person who is dissatisfied with any decision made by the Superintendent* under subsection (3) on the ground that —

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent.

(ii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty one days from the date of receipt of the decision of the Superintendent by *notice in writing* addressed to the Superintendent *require the matter to be referred to arbitration* in accordance with section 212.

[15] The question arises whether s 5(3) and (4) of the Sarawak Land Code contravenes the provision of the Federal Constitution in particular arts 5, 8, 13(2) and 153 of the Federal Constitution or art 39 of the Sarawak State Constitution so as to be struck down as being unconstitutional.

[16] Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law.

[17] Article 8(1) of the Federal Constitution states that all persons are equal before the law.

[18] Article 13(1) and (2) of the Federal Constitution provides that no person shall be deprived of property save in accordance with law and no law shall provide for the compulsory acquisition or use of property without adequate compensation.

[19] Article 153 of the Federal Constitution provides that it shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the states of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of the article.

[20] Article 39 of the Sarawak State Constitution provides for the Yang di-Pertua Negeri to safeguard the special position of the natives and to ensure the reservation of quotas for the natives in respect of public service and educational facilities.

[21] The aforesaid question was addressed by the learned trial judge and after applying his mind to the several provisions and articles aforesaid concluded that s 5(3) and (4) of the Sarawak Land Code does not violate arts 5, 8, 13 and 153 of the Federal Constitution or art 39 of the Sarawak State Constitution.

[22] The learned trial judge's reasoning in arriving at the conclusion can be found in pp 33–42 of the appeal record and we do not see any error on his part.

[23] The learned trial judge was correct in adopting the Court of Appeal decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256.

[24] The law is settled that native customary rights can be extinguished by legislative or executive acts carried out in pursuance to statutory provisions so long as compensation is paid. Section 5 of the Sarawak Land Code is one such provision in that it is a piece of legislation which provides for extinguishment of native customary rights and compensation to be paid for such extinguishment and accordingly is intra vires the Federal Constitution.

[25] It is a valid piece of legislation which is allowable under art 5 of the Federal Constitution, non-discriminatory in nature so as to offend art 8 of the Federal Constitution and in providing for compensation falls within the ambit of art 13 of the Federal Constitution.

[26] To summarise the legal position, native customary rights can be extinguished in accordance with the law and with payment of compensation. There is no law, either constitutional or statutory which decrees that it cannot

be terminated or extinguished at all. The evidence herein shows that compensation was awarded and paid to the persons whose native customary rights were extinguished by the Ministerial direction.

[27] Hence the learned trial judge was correct in his ruling that s 5(3) and (4) of the Sarawak Land Code does not violate arts 5, 8, 13 and 153 of the Federal Constitution and his decision is accordingly upheld.

[28] It has to be emphasised that s 5 of the Sarawak Land Code by reason of its applicability to all natives is non-discriminatory. The tenor of art 8 permits classification and we can do no better than quoting the sage words of the illustrious Suffian LP in *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 when he stated:

> In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty: the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. *All that art 8 guarantees* is *that a* person in one *class should be treated the same as another* person in *the same class*, so that a juvenile must be tried like another juvenile, a rate payer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on. (Emphasis added.)

[29] Learned counsel for the plaintiffs tenanciously pursued to have s 5 of the Sarawak Land Code struck down by advancing the argument of procedural fairness in that the plaintiffs were not granted a right to be heard before their native customary rights were extinguished.

[30] The learned trial judge admirably dealt with the issue at pp 41–42 of the record of appeal. He relied on the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665 where the court held that procedural fairness ought to be confined only to the issue of adequate compensation for if the constitutional argument of procedural fairness is insisted upon it would have disastrous consequences in that public administration would grind to a halt as would the development of the country.

[31] This feasibility restriction in the field of procedural fairness had earlier been laid down by the Federal Court in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 where Abdoolcader J (as he then was) states:

> Considering the provisions and scheme of the Act, the short answer to this point is that there is nothing in the legislation imposing any such obligation in marked contrast to the specific provisions for an inquiry and hearing in respect of the quantum of compensation payable. This very point was taken before the Privy Council in *Mukta Ben & Anor v Suva City Council* where it was contended, inter alia, that the requirements of natural justice were not observed but the judicial committee held (at p 779) that the acquisition could not be impugned on any ground of natural justice, since the legislation imposed no obligation to inform the appellants in that case that an application for compulsory acquisition was contemplated or to invite them to make representations to the governor and that he had in no way acted unfairly in regard to them. The rules of natural justice vary in content and ambit according to the circumstances and context (*Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor*, *Merdeka University Berhad v Government of Malaysia*) and the English Court of Appeal in *Regina v Raymond* (at p 670) approved the proposition that the courts should not fly in the fact of a clearly evinced Parliamentary intention to exclude the operation of the audi alteram partem rule.
>
> It is clear that any such right of a pre-acquisition hearing would stultify acquisition proceedings throughout the country and the scheme of the Act would appear in effect to specifically proceed on this basal premise.

[32] In the case at hand since the law does not impose on the Minister a duty to grant the plaintiffs pre-acquisition hearing the operation of the audi alteram partem rule is excluded.

[33] Accordingly the plaintiffs' challenge that the direction made by the Minister is invalid on account of lack of procedural fairness cannot be sustained.

[34] We shall now address the procedural challenge of the plaintiffs in that the trial judge erred in holding that the plaintiffs' action herein should have proceeded by way of judicial review under O 53 of the Rules of the High Court.

[35] The trial judge at p 45 of the appeal record found that in essence the claim of the plaintiffs is against the decision of the Minister and accordingly the proper procedure is by way of judicial review to quash the decision of the Minister through a writ of certiorari. The judge grounded his decision on Clement Skinner J's (as he then was) decision in *Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor* [2005] 2 MLJ 555; [2004] 4 CLJ 775:

> So although the plaintiffs say that the native customary rights which they claim to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognised by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.
>
> It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs' remedy to enforce or protect rights created *or* acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should have proceeded to seek judicial review of the Minister's direction and first defendant's decision under O 53 of the RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v Mackman* which is the next question I will address.

[36] The facts herein are devoid of any private law element — the extinguishment of the plaintiffs' native customary rights was executed by the Minister through the exercise of his powers as conferred by the Sarawak Land Code and hence must in the circumstances necessarily lie in the field of public law.

[37] The Federal Court had lately in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865 reiterated that matters which have substantial public law element must be proceeded upon through the mechanism as provided for by O 53 of the RHC for otherwise it would be rendered redundant.

[38] James Foong FCJ in delivering the judgment of the Federal Court stated:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it has a substantial public law element then the procedure under O 53 of the *RHC must* be *adopted*. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court *should* be circumspect in allowing a matter which should *be by* way of *O 53 of the RHC to proceed* in another *form*. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be

rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

[39] The Federal Court judgment in *Ahmad Jefri* has now been followed by the Court of Appeal in *Ketua Pengarah Buruh v Britania Brands (Malaysia) Sdn Bhd* [2010] 6 CLJ 370.

[40] In our view the Ministerial direction is very much in the realm of public law and any challenge thereto must be pursued through the procedure as laid down by O 53 of the RHC.

[41] For the reasons adumbrated above we find no error in the decision of the learned trial judge which warrants appellate interference.

[42] The appeal is accordingly dismissed with costs in the sum of RM1,000. The deposit of the appeal be paid out to the defendants to account of fixed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan